



Comisiynydd Plant Cymru Children's Commissioner for Wales

Ymateb i Ymgynghoriad / Consultation Response

Date / Dyddiad: 1 March 2017

Subject / Pwnc: Additional Learning Needs and Education Tribunal (Wales) Bill

Background information about the Children's Commissioner for Wales

The Children's Commissioner for Wales is an independent children's rights institution established in 2001. The Commissioner's principal aim is to safeguard and promote the rights and welfare of children. In exercising their functions, the Commissioner must have regard to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner's remit covers all areas of the devolved powers of the National Assembly for Wales insofar as they affect children's rights and welfare.

The UNCRC is an international human rights treaty that applies to all children and young people up to the age of 18. It is the most widely ratified international human rights instrument and gives children and young people a wide range of civil, political, economic, social and cultural rights which State Parties to the Convention are expected to implement. In 2004, the Welsh Government adopted the UNCRC as the basis of all policy making for children and young people and in 2011, the National Assembly for Wales passed the Rights of Children and Young Persons (Wales) Measure, which places a duty on Welsh Ministers, in exercising their functions, to have 'due regard' to the UNCRC.

This response is not confidential. My responses to specific consultation questions are below. I have not responded to every consultation question but only to those of direct relevance to my remit.

The general principles of the Additional Learning Needs and Education Tribunal (Wales) Bill

1.1 I support the general principles of the Additional Learning Needs and Education Tribunal (Wales) Bill (the Bill) and its intentions to introduce a new legal framework that brings together the existing requirements of Part IV of the Education Act 1996 with the support provisions for young people. The Bill signals an important point of progress and seeks to develop a unified framework of support for children and young people with additional learning needs (ALN) in Wales. It is clear to me that the Bill seeks to establish a common framework of support for children and young people with ALN, and there is much to be commended about the latest iteration of the Bill including strengthened duties on health boards, arrangements for independent advocacy and clear duties surrounding provision for looked after children. That said, it is my view that the legislative provisions of the Bill could be improved to provide a greater focus on child-centred practices and give further effect to the whole of the United Nations Convention on the Rights of the Child (UNCRC). The UN Committee on the Rights of the Child's Concluding Observations in June 2016 recommended Welsh Government enhance its efforts to reduce the effects of social background or disabilities of children on their achievement in school and to guarantee the right of all children to a truly inclusive education¹. The Bill provides the necessary framework for this recommendation to be fulfilled if the transformation programme is sufficiently resourced and fully implemented.

1.2 Extending legislative provision to cover children and young people aged between 0 – 25 years old is welcomed, although I am concerned how this extension will be sufficiently resourced and monitored. The move towards a definition of "Additional Learning Needs" is responsive to views that many children and young people have expressed in wanting to move away from the term 'Special Educational Needs' (SEN) as they felt that it had negative and demeaning connotations. The term 'Additional Learning Needs' reflects a more holistic approach to responding to the learning support needs of children and young people. Whilst Section 86 sets out the range of general interpretations within the Bill, Section 2 could do more to explicitly outline the legal interpretation of what is meant by the terms 'child' and 'young person'. This is important because provisions made throughout the rest of the Bill treat children and young people differently. The Bill currently describes a young person as someone who is above compulsory school age. I am concerned that certain sections of the Bill give no consideration to applying the UNCRC's principle of best interest should a young person refuse an Individual Development Plan (IDP). In line with Articles 1 and 2 of the United Nations Convention on the Rights of the Child, I would like the Bill to extend the definition of a 'child' to cover anyone aged under 18. This would provide a parity of rights for all children, as defined by the UNCRC, with additional learning needs. The provisions relating to young persons in the Bill would then be consistent with the rights associated with attaining the age of majority. If this cannot be achieved, then the Bill should introduce legislative provision that sufficiently balances a young person's right to be heard with the right for their best interests to be protected through an explicit duty of due regard for all of those exercising functions under the Bill.

1.3 Additionally Section 13(1)(a) of the Bill defines a looked after child for the purposes of additional learning provision (ALP) as a child who "is not over compulsory school age". Part 6 of the Social Services and Wellbeing Act defines a looked after child who local authorities have responsibilities for as a child up to the age of 18, whilst also specifying continued duties to all previously looked after young people up to

¹ <http://gov.wales/docs/dsjlg/publications/cyp/160727-final-concluding-observations-2016-en.pdf>

the age of 21, and up to twenty five for those involved in education. The duties to prepare and maintain plans for looked after children as currently drafted within the Bill would automatically end after compulsory school age, even when the child/young person has additional learning needs, and remains looked after by the local authority and in education, appearing to overwrite the definition of looked after children and the associated responsibilities as contained in a landmark piece of Welsh legislation. I therefore suggest that the words “is not over compulsory school age” are removed from S.13 so that the definition of a looked after child is consistent and ALP can be secured to meet their ongoing needs.

1.4 It has been useful to have sight of the Children’s Rights Impact Assessment (CRIA) made of the Bill. It is clear that Welsh Government has given some consideration to the UNCRC in developing its rationale and content, however I struggle to see how the CRIA has been used as an instrument to make better child centred policy. The last sentence under section 2 of the CRIA states that Welsh Government have identified no potential negative impacts of their proposals on children and young people. This seems a surprising view to take for a piece of legislation which has taken around a decade to develop and which has many potential unintended consequences if the proposals are implemented without diligence, as highlighted through various consultations and even in the Government’s own Explanatory Memorandum (EM). Such an observation therefore undermines the advice given to the Minister in step 4 of the CRIA which merely states that a CRIA has been completed and that no conflict with UNCRC articles has been identified. A more ambitious approach would have sought opportunities within the gift of Government’s policy reform to maximize opportunities within the Bill to advance children’s rights and develop legislative duties which can enable children to be the best they can be.

1.5 I feel more could have been done to frame the overarching objectives and core aims of the Bill within a children’s rights based way to truly emphasize the priority they afford to realizing the UNCRC in the lives of all children and young people in Wales. As the CRIA highlights, Articles 28 and 29 of the Convention entitle children to an education which should develop each child’s personality to the full, and these rights should be the bedrock on which the Bill and ALN transformation programme is built upon. In order to maintain high aspirations and secure improved outcomes for children and young people with ALN, the Bill must synergize with work streams being taken forward following the Successful Futures and Teaching Tomorrow’s Teachers reviews. In light of both of these reviews, I am of the firm belief that a significant opportunity exists for Welsh Government to create an innovative, dynamic and robust offer of rights-based education for every learner in Wales. To successfully and sustainably achieve this intention, Welsh Government must ensure that progress for this work is underpinned and informed by the UNCRC. Proposals and changes must be indicative of a Children’s Rights Approach and be able to sufficiently demonstrate primary consideration to children and young people’s best interests and holistic wellbeing.

1.6 My office has been working with the Wales Observatory on Children’s Human Rights to define and detail what a Child’s Rights Approach truly constitutes, and, while we will be publishing a detailed and accessible methodology later this month, a summary follows which links this approach to the Bill.

We must endeavour to match the principles of our laws and policy with meaningful actions which improve outcomes of children and young people. A Children’s Rights Approach is a principled and practical framework for working with children, grounded in the UNCRC. It is about placing the UNCRC at the core of planning and service delivery and integrating children’s rights into every aspect of decision-making, policy and practice.

The principles of a Children’s Rights Approach are:

- Embedding children's rights
- Equality and Non-discrimination
- Empowering children
- Participation
- Accountability

Embedding children's rights

Children's rights should be at the core of planning and service delivery. The UNCRC needs to be integrated into every aspect of decision-making through procedures and actions.

By placing a duty on all persons exercising functions under this Bill to pay 'due regard' to the UNCRC, the Bill provides an opportunity for children's rights to be further embedded in Welsh legislation, policy and practice. The rationale for this is further explained in paragraphs 1.7-1.11 below.

Equality and Non-discrimination

Equality is about ensuring that every child has an equal opportunity to make the most of their lives and talents, and that no child has to endure poor life chances because of discrimination. Equality involves treating all children fairly, and providing them with opportunities and resources according to their needs, equal with others, ensuring that they are able to develop to their fullest potential.

This Bill, clearly has the potential to play an important role in ensuring that children have an equal opportunity to fulfil their potential.

Empowering children

Empowerment means enhancing children's capabilities as individuals so they are better able to take advantage of rights, and to engage with, influence and hold accountable those individuals and institutions that affect their lives. Children should be given information to increase their understanding about human rights, and access to resources to enable them to make use of rights in their everyday lives.

This Bill has the potential to give all learners the opportunity to be empowered citizens who are enabled to participate in their education and in society.

Participation

Participation means listening to children and taking their views meaningfully into account. All children should be supported to freely express their opinion; they should be both heard and listened to. Their views should be taken seriously when decisions or actions are taken that affect their lives directly or indirectly (as guaranteed by Article 12 of the UNCRC).

The provision of advocacy within this Bill and the requirement to involve learners in developing IDPs provides a meaningful opportunity for Article 12 to be implemented in this area of educational provision and practice.

Accountability

Children should be provided with information and given access to procedures which enable them to question and challenge decision-makers. Accountability requires effective monitoring of children's rights standards as well as effective remedies where there is a failure to meet these standards.

This area of a child rights approach can be implemented through a number of aspects of the Bill, from providing children and young people with adequate information throughout the process of assessment and provision to providing clear access to the Educational Tribunal for Wales, where required.

1.7 In order to meaningfully establish a Child Right's Approach across Wales, a significant opportunity exists for Welsh Government to provide legislative alignment with Section 7(2) of the Social Services and Wellbeing (Wales) Act 2014 to place a duty upon all persons exercising functions under this Bill to pay due regard to the UNCRC and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and an amendment should be brought forward which places this duty at the outset of the Bill, as accompanied by a reframing of the Bill's policy objectives within Children's Rights Approach framework.

1.8 There was significant debate in the last Assembly surrounding extending the duty of due regard beyond the functions of Welsh Ministers, and I wish to provide more detailed briefing to assist the Committee in scrutinising the Bill. The first public office in Wales to be obliged by law to absorb the UNCRC in the exercise of functions was my role, under Regulation 22 of the Children's Commissioner for Wales Regulations 2001. Building on this and drawing from experience of the operation of the 'due regard' concept in equalities legislation, Welsh Ministers became obliged, under the Rights of Children and Young Persons (Wales) Measure 2011 (Rights Measure), whenever they exercise their functions, to have due regard to the scheduled requirements of the UNCRC and its Optional Protocols.

1.9 More recently, section 7 of the Social Services and Well-being (Wales) Act 2014 places a due regard duty on persons exercising functions under the Act in relation to a child who has care or support needs, is a carer with support needs or is a looked after child or care leaver. The Act identifies the following persons now subject to 'due regard' when exercising powers or duties in relation to such a child:

- Welsh Ministers (who would of course be already covered by the 2011 Measure duty)
- Local authorities
- Local Health Boards
- A person to whom a local authority has made a direct payment (who may, subject to regulations, use the payment to purchase care and support in relation to a child)
- Independent reviewing officers (looked after children)
- Welsh family proceedings officers
- The National Independent Safeguarding Board

- Safeguarding Children Boards
- The Public Service Ombudsman for Wales

Furthermore, this section 7 duty applies to a wide range of functions, from the setting of broad policy in regulations, codes and guidance, to drawing up local plans and strategies, to carrying out individual needs assessments, making decisions about provision of services and to actually providing or procuring those services. The services may include accommodation, individual care and support, provision of services, goods, equipment, occupational therapy, giving information and advice, independent reviewing functions in relation to looked after children and dealing with complaints and representations. Accordingly, 'due regard' has already penetrated the Welsh statute book at all the levels of decision-making, from Welsh Ministers down to those procuring and delivering statutory social care in relation to children in need, looked after children, care leavers and child carers.

1.10 The rights under the UNCRC are both universal and indivisible and as such should be made available to all children and young people accessing education. The general principles of the UNCRC provide the basis for my call for the extension of the duty of due regard to be extended to those exercising functions under the Bill, so that the best interest of all children are always at the forefront of decision making. It is vital that we build upon the foundations we have laid down in Welsh civic society to empower our young citizens with their rights and entitlements. In its current form the Bill does implicitly examine the fulfilment of children's rights in education however there is no explicit reference to the UNCRC. Explicit reference to the UNCRC would place the requirements of the Bill within a coherent, politically neutral and internationally agreed set of values. It would also place children's rights as a guiding principle for additional learning needs and provision in Wales and make explicit the role of local authorities, health boards, school governing bodies, teachers, learning support staff and relevant others as duty bearers of the convention.

1.11 There may be a fear that legislating for due regard on the face of the Bill would result in further litigation and challenge, yet we should not shy away from giving children's rights giving greater prominence in public affairs. Due regard essentially promotes fair consideration of children's rights, not necessarily their precedence over parents' rights or other related factors which would all fall within decision making in the best interests of children, as enshrined by article 3 of the UNCRC. Indeed, Article 41 of the Convention states if the laws of a country provide better protection of children's rights than the articles in this Convention, those laws should apply. Therefore providing a due regard duty in this Bill will both promote children's rights and work in tandem with other legislation in safeguarding children's well-being.

Potential barriers to the implementation of the key provisions and any unintended consequences arising from the Bill

2.1 There is potential for unintended consequences arising from the definition of "Additional Learning Provision" (ALP) in the Bill through the application of the proposed current definition. Section 3(1) refers to provision "that is additional to, or different from, that made generally for others of the same age". It is my view that the inclusion of the term "different from" blurs the distinct boundary between existing responsibilities to differentiate classroom-based teaching and any additional learning support provision. As is recognized in the draft code, providing differentiated teaching does not necessarily mean that an

individual child or young person has additional learning needs. It is my view that the term “different from” does not achieve its intended aim in Section 3(1) and should be removed.

2.2 I welcome the provisions set out by section 6 of the Bill which require persons exercising functions to ensure that the views of children, their parents and young people influence, as far as possible, the relevant decision-making processes relating to their additional learning needs. It provides statutory protection to person-centred planning and gives further effect to Article 12 of the UNCRC. I am concerned that the Bill has not sufficiently balanced a young person’s right to be heard with duty-bearers’ responsibilities to give primary consideration to an individual’s best interests as stipulated by Article 3 of the UNCRC. Section 11(2) of the Bill nullifies duties to establish an Individual Development Plan should a young person not consent to a decision being made. I am concerned that this position gives no consideration to what might be in the best interests of an individual young person and does not give due consideration to their individual evolving capacity. Simply removing all support on the basis of a young person’s refusal could result in an absence of additional learning provision that should have been established to meet that young person’s individual best interests, rights and wellbeing needs. This is further complicated by the definition of a child and young person as currently applied by the Bill. Clear guidance is required to balance out the views and wishes of young people with those of parents, carers and professionals so that a child’s education is needs led and continues for as long as is required to practically meet those needs. In addition, Section 6 does not sufficiently recognise that a child’s immediate care and support needs might be provided by somebody other than a parent. Where this may be the case, every effort should be made to involve a child or young person’s carer (including those with delegated authority, e.g. foster carers) in decisions relating to the exercise of functions under the Bill and amendments should be brought forward to legislate for their involvement.

2.3 Whilst the LA or a governing body must make a decision (section 9) about the child’s ALN, the assessment process remains unclear. I have further concerns about the level of specialist provision that will be available under the Bill. For example, there is no reference to the existing statutory role of educational psychologists in completing assessments and reports as part of the current statementing process. It is unclear from the Bill and draft Code at what point and under what circumstances a child or young person would have a statutory right to an assessment. There is a real danger that without providing a statutory framework inclusive of specialist provision from educational psychologists that the service may face an uncertain future and if it were to become limited to private provision may mean families living in poverty would not be able to have the necessary access and expertise.

The process for developing and maintaining Individual Development Plans (IDPs)

2.4 I welcome provisions made under section 8 of the Bill to establish a statutory unified planning process for children and young people with additional learning needs. I am pleased that the draft Code proposes duties upon persons exercising functions to contain mandatory content when establishing an IDP, in order to drive consistency and portability of ALN provision across Wales, whilst having the flexibility to include additional relevant information. It is a strongly held view of mine that the Bill will be significantly strengthened by amending section 8(b) to certify that an IDP must contain additional learning provision which is detailed, specific and quantifiable to meet the needs described in 8(a). Any ambiguity within the system has the potential to result in more appeals being made to tribunal and should be avoided in order to ensure that resource and capacity are maximized on provision and towards meeting the child’s potential and achieving improved outcomes. Section 11.36 of the draft Code states that the ‘information recorded in relation to ALP will be more useful the

clearer it is. It should be detailed, specific and quantifiable', before going on to elaborate potential pitfalls when there is confusion surrounding provision. An amendment to the Bill will thus permeate through to the Code and secure the clarity and service provision required.

2.5 Section 7.22 of the EM states that there is potential for cost savings both in terms of professional time and in time involved in organizing and coordinating assessment and review meetings. Of course a more streamline approach is to be welcomed, but views of parents, carers and professionals who are concerned that the new system may lead to support being given based upon availability of provision, as opposed to meeting identified need, may be exacerbated if the design of the system is viewed to be driven by efficiency savings.

2.6 The reality is of course that the adoption of Welsh Government's preferred approach to IDPs will see the number of children and young people with a statutory plan rising from approximately 13,000 to 107,000. There is a perception that this increase would cause potential strain on the system and that it might prove detrimental to those previously with and without a statement. Section 7.30 of the EM outlines how children, young people and parents may have increased expectations of a statutory plan compared to their previous non-statutory plan and could challenge decisions regarding provision resulting in more time spent managing disagreements. The remedy offered through the EM and the Bill is through the provision of personal centred planning, as articulated within section 6 of the Bill. Yet it is fair to say that person centred planning is already common practice with regards to school action interventions for ALN. Moving across to the new system requires considered and strategic communication to children, young people, parents and carers so that there is confidence and consistency in the new system. In effect the move to statutory IDPs leads the way to an enhanced system as non-statutory Individual Education Plans (IEPs) should have already been made available to all non-statement learners, so the changes can give further effect to children's rights as they will all now be underpinned by legal securities. Professionals should also be reassured as the replacement of IEPs with IDPs should not place new burdens upon their time and capacity, but instead underpin their assessment and interventions with more robust basis to support them in their roles.

2.7 As has been previously highlighted by the Assembly Research Service and the Special Educational Needs Tribunal for Wales, the extension of the IDP to all learners with ALN could result in the watering down of provisions for learners with severe and complex needs. The Bill makes a distinction between more severe and complex cases by assigning local authorities with responsibilities for maintaining a learner's IDP, although in the majority of cases it would be the school or college. It remains unclear to me from section 10 of the Bill as to what criteria should be met for a governing body to determine that a matter is beyond its capability to decide or that would be unreasonable for the governing body to secure additional learning provision. One solution would be for clear criteria to be set in order for a governing body to be enabled to make a referral to a local authority. The concern is that rather than creating a unified system, the potential for misinterpretation will raise an unnecessary barrier for support with ALP as the governing body and local authority may become embroiled in arguments over responsibility.

2.8 Another alternative, would be to clarify that the primary duty for ALP resides with the local authority, but maintain governing bodies' responsibilities for coordinating provision and monitoring progress within the school setting. Such an approach would be consistent with the legal position between school governing bodies and local authorities, and could then allow for a clear mechanism for governing bodies to escalate concerns in order to promote collaborative and integrated working as required by the

Wellbeing of Future Generations Act. Local authorities' role within public service boards would mean they are effectively placed to influence securing additional provision required outside of the school setting. The EM states:

3.91 Where a learner with an IDP maintained by a local authority is registered or enrolled at a maintained school (including a maintained nursery) or FEI, the Bill (section 41) requires that the school or FEI takes all reasonable steps to secure the ALP included in the IDP – but ultimate responsibility rests with the local authority that maintains the IDP.²

Whilst this direction is intended under the current proposals whereby local authorities maintain responsibility for IDP's of more complex cases, it seems rational and practical for this to be the arrangement for the governance of *all* IDP's within the school setting, and I encourage amendments to be brought forward which give effect to such a system.

The establishment of a genuinely age 0-25 system;

2.9 I am encouraged by the direction towards a 0-25 system which responds to the UN Committee's recommendation for Welsh Government to implement a children's rights approach and provide children with ALN with a comprehensive and integrated package of services for transition to adulthood, by involving children and young people in the design of services having had information, advice and assistance³. I concur with the alliance of teaching unions, who assert that arrangements for transition between key stages and settings are fundamental to children and young people receiving the right support, as is a plan for once they reach 25⁴. Planning should begin at least 6 months in advance of any transition where possible. There should be provision set out in the code for key meetings in terms of transition to take place between relevant nurseries, primary and secondary schools, schools and further education institutions (FEIs), schools or FEIs and university as well as with special schools or Pupil Referral Units (PRUs) to ensure that ALP is met.

The capacity of the workforce to deliver the new arrangements;

2.10 Section 10(5) of the Bill states that if it is decided an individual development plan should be provided to the child or young person in the Welsh language, then it should be specified so. However this is not as strong as other areas of the Bill, such as health provision for example, where it states in section 18(5)(c) that all reasonable steps should be taken to secure service provision through the medium of Welsh. Consistent with Articles 12 and 13 of the UNCRC, children and young people's rights can be advanced when they are able to communicate in their language of choice and the Bill should be strengthened to give further effect to those rights and achieve the ambition to increase the provision of Welsh-medium activities for children and young people and to increase their awareness of the value of the language.

2.11 During 2016 the Welsh Language Commissioner and I responded to concerns from parents about the availability of Welsh medium provision for ALN, by undertaking an information gathering exercise

² <http://www.assembly.wales/laid%20documents/pri-ld10862-em/pri-ld10862-em-e.pdf> p30-31

³ <http://gov.wales/docs/dsjlg/publications/cyp/160727-final-concluding-observations-2016-en.pdf>

⁴ <https://www.atl.org.uk/Images/Additional-learning-needs-shared-union-concerns-Welsh-and-English%20September%2016.pdf>

exploring the extent to which local authorities in Wales have succeeded in meeting demand for Welsh medium education. We circulated a short questionnaire to Directors of Education in all 22 Welsh local authorities and our analysis of the survey results found that support for pupils with ALN in Welsh medium schools was generally unsatisfactory. There were a lack of assessment tools available through the medium of Welsh, and a lack of Welsh speaking specialist staff such as Education Psychologists resulting in children and young people with Additional Learning Needs being assessed and provided with services through the medium of English.

2.12 The survey results clearly indicate that the majority of local authorities were unable to fully respond in Welsh to the range of additional learning needs that they were dealing with. In particular there were gaps in provision in relation to autism, those with particularly serious conditions, speech and language services, and a shortage of staff within the various services and teams that support schools, including behaviour support. A number of authorities mentioned the difficulty of recruiting suitably qualified Welsh speaking specialist staff, whilst other authorities appear to have a larger range of Welsh speaking specialist and support staff. Unsurprisingly the local authority areas where Welsh was more widely spoken were less likely to raise this as an issues but that did depend to a certain extent upon the nature of the specialist support required. Some authorities reported that they do not undertake speech and language assessments in Welsh because teachers do not feel that they have the skills or qualifications to do this

2.13 It is a concern that there do not appear to be an agreed suite of Welsh medium standardised assessment tools for additional learning needs. This has led to some schools developing their own materials or translating English language assessment tools, which whilst laudable in meeting the needs of the child or young person, is a concern because it was unclear as to whether such materials had been properly accredited and validated. This could affect the accuracy of the assessment being undertaken and it was unclear whether they would have any portability should the child or young person move to a different local authority area. A number of authorities confirmed they include information about the language requirements of the child or young person as part of their SEN Statement, with only one local authority stating this was not current practice.

2.14 The survey results help highlight the enormity of the challenge facing Welsh Government's ALN transformation programme as although the Bill bestows duties with regards to the provision of Welsh language education, it is clear that the infrastructure required to meet these duties is far from being in place and significant investment and resource is required to support professionals to meet children's linguistic needs so that they can reach their full potential.

The proposed new arrangements for dispute resolution and avoidance.

2.15 Where disagreement or dispute may arise with regard to a decision relating to a child or young person's additional learning needs, it is important that arrangements are put in place to ensure that the quickest and most appropriate resolution is identified at the local level. I therefore welcome provision which secures the continuation of the Special Educational Needs Tribunal for Wales (hereafter referred to as the 'Education Tribunal for Wales') under Chapter 4 of the Bill.

2.16 Under section 61(3), local authorities will be required to establish arrangements for independent support to be provided to children, young people and their families should there be any disagreement or dispute concerning a decision or content of an IDP, consistent with the role of Government to provide

services to support parents under Article 18 of the UNCRC. I wholly welcome these provisions and those on independent advocacy services as set out in section 62 and it seems wise for Welsh Government to consider how these arrangements will dovetail with the statutory Advocacy entitlement required by the Social Services and Wellbeing (Wales) Act 2014. In extending the right to independent advocacy to children and young people with additional learning needs under this Bill, Welsh Government will need to ensure a consistent approach is established to avoid a disparity of rights and provision between the different groups of children and young people that the Bill intends to cater for. The Bill and draft Code could be clearer in making the distinction between the role and function of rights-based independent advocacy provision and that of advice and assistance, which is intrinsically linked in the Bill. Perhaps a reference to advocacy provision detailed in Part 10 of the Social Services and Wellbeing (Wales) Act could assist to clarify the separate roles and functions. There is also some confusion in this section in relation to references toward children and young people for whom the local authority is responsible. The reason for this uncertainty is due to the previous distinctions made between children and young people who school governing bodies are responsible for maintaining an IDP, and that local authorities are responsible for. I would assume that the reference regarding to advocacy would be about all of the children resident in the local authority area but this should be clarified on the face of the Bill as it could be misinterpreted to only mean children and young people with a local authority maintained IDP and looked after children. If, as has previously been suggested, the Bill bestows overall responsibility for ALP upon local authorities then this uncertainty would no longer remain.

2.17 My Office has consistently raised concerns about the lack of mechanisms available to the Education Tribunal for Wales to promote accountability and implement sanctions upon parties who do not comply with orders by them, and advocate for amendments to be brought forward which confers enforcement powers upon the Tribunal. The current position undermines children and young people's appellant rights and results in a failure to secure their best interests at the highest levels. I am pleased that section 69 prescribes a way for the Tribunal to set a time limit on orders they make toward governing bodies and local authorities but this alone will not ensure orders are fulfilled by duty bearers.

2.19 Children and young people's health related additional learning needs can often be a major barrier to educational engagement and failures of the NHS to meet these needs may have a 'knock on', adverse impact upon the success of wider additional learning provision described within an IDP. It is my view that the Bill must capitalize upon the proposed statutory duties placed upon LHBs and NHS Trusts to meet the health-related additional learning needs of children and young people. Health bodies must, therefore, be included within the scope of appeal and be subject to the powers conferred upon the Education Tribunal for Wales. It would be counter-intuitive for the Bill not to provide further powers for the Education Tribunal for Wales to hold LHBs or NHS trusts to account, and contrary to NHS Core Principles and Values, in particular 'Principle 7: The NHS is accountable to the public, communities and patients that it serves'. I am therefore calling for an amendment which sufficiently strengthens powers of the Education Tribunal for Wales within the Bill in relation to the provision of health services and treatment.

2.20 Welsh Government have previously offered a position that, as a result of existing appeals processes already in place for health services, it was deemed unnecessary to bring health services into the educational tribunal processes under the Bill. The success of such a multi-faceted approach is dependent upon the following⁵:

⁵ <https://www.atl.org.uk/Images/Additional-learning-needs-shared-union-concerns-Welsh-and-English%20September%2016.pdf>

- Clarity of each process to the individual / organisation choosing to appeal
- The ability of educational organisations to make an appeal within a health appeals system
- The potential bureaucratic nature of multiple appeals running in parallel
- The quality and availability of advocacy services for those who require them
- The capacity of the NHS / LHB to meet the demands of potentially increasing appeals.

This potentially does not represent the best interests of the child or young person and in many cases the duty may still fall to educational settings to seek to provide the appropriate health-related provision – not the health board or NHS trust. This is also anomalous with regards to the principles of seeking a unified legislative framework to support all children and young people with ALN. Through the appeal process in the English Tribunal for Special Educational Needs and Disability, the Tribunal cannot deal with the information about non-education health and social care needs or how the local authority plans to meet those needs; yet it is able to look into health provision in an educational context and the Education Tribunal for Wales should have the same level of power in order to secure the level of accountability children and young people need to protect their rights and entitlements.

The financial implications of the Bill

3.1 In line with Article 4 of the UNCRC, ALN must be properly funded, and Welsh Government must allocate the maximum extent of available resources for the full implementation of children’s rights with prevention of cuts by local authorities to ALN budgets. Through the UN Committee’s concluding observations in June 2016 it was recommended that government should define budgetary lines for children in disadvantaged or vulnerable situations that may require affirmative social measures and make sure that those budgets are protected in situations of economic recessions⁶.

3.2 I am concerned about the delegation of budgets and of what information would be used to determine the proportion of allocation as currently ALN funding is un-hypothecated and it remains unclear as to how the proportion of delegated budgets would effectively balance the requirements of governing bodies and local authorities to meet the additional learning needs of children and young people in their area. The EM also remains unclear as to how spending arrangements will be effectively monitored to ensure that actual spend meets the additional learning needs of individual children and young people. My office has previously called upon Welsh Government to ring-fence budgets for additional learning needs by way of regulation and prescribe for regional education consortia to monitor governing bodies’ spending arrangements. I believe this approach would provide parity with existing arrangements set out with the looked after child element of the Pupil Deprivation Grant, and would be easier to achieve if local authorities maintain overall provision for coordinating ALP. As is highlighted within section 8.607 of the EM, the ALN reforms complement the Pupil Deprivation Grant as investments in effective approaches for tackling the impact of deprivation on educational attainment. Section 1.21 of the draft Code identifies the role of Education Consortia within the ALN system as support for local authorities to provide strategic oversight in light of school improvement therefore there is clear scope for Consortia to take a leading role in the implementation of the transformation programme that the Bill is predicating.

⁶ <http://gov.wales/docs/dsjlg/publications/cyp/160727-final-concluding-observations-2016-en.pdf>